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Supreme Court of the United States

October Term, 1955

No. 205

UNITED STATES OF AMERICA, ex rel., ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS,
Petitioners,

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioners respectfully ask this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered May 9, 1956, which judgment affirmed the order of the United States District Court for the Southern District of New York, dated August 1, 1955.

Opinions Below

The opinion of the District Court, Dawson, U. S. D. J., dismissing the writ of habeas corpus herein has been reported in 133 Federal Supplement at page 433, and also appears at page 2a of the record herein. The opinion of the Court of Appeals affirming same has not yet been

reported and appears at page 23a of the record herein. Said District Court opinion and both the majority opinion of Judges Hincks and Waterman and the dissenting opinion of Judge Frank are printed as appendices to this petition.

Statement of Grounds of Jurisdiction

1. The judgment of the Court of Appeals was rendered and entered on May 9, 1956.

2. No application for rehearing was made.

3. The Court of Appeals stayed the issuance of the mandate by order of May 28, 1956 in accordance with its Rule 28(c)(1) and (2).

4. The jurisdiction of this Court is invoked pursuant to 28 U. S. C., Section 1254.

Question Presented for Review

Whether or not the Courts below erred in not holding that it was an improper exercise of discretion, or in effect a total failure to exercise its discretion under the appropriate statute, for the Board of Immigration Appeals to permit its action in a matter solely within the purview of Section 19(c)(2) of the Immigration Act of February 5, 1917, as amended in 1940, to be unduly narrowed and influenced by Congressional Committee Reports made in the course of the enactment of the subsequent Immigration and Nationality Act of June 27, 1952, which, in its Saving Clause, Section 405, expressly provides that said 1917 Act, as amended in 1940, shall solely apply to cases which arose prior to the effective date of said 1952 Act?

Statutes and Rules Relied On

Section 19(c)(2) of the Immigration Act of February 5, 1917, as amended by the Act of June 23, 1940, c. 439, Section 20(c), 8 U. S. C. 155(c)(2), which, so far as here pertinent, provides:

> "(c) In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization, * * * if he finds (a) that such deportation would result in serious economic detriment to a citizen * * * minor child of such deportable alien; * * *."

Section 405(a) of the McCarran Immigration and Nationality Act of June 27, 1952, 8 U. S. C. 1101 note, which, insofar as relevant, provides:

> "(a) Nothing in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any * * * proceeding which shall be valid at the time this Act shall take effect; or to affect any * * * proceedings, civil or criminal, brought, * * * at the time this Act shall take effect; but as to all such * * * proceedings * * * the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * *An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection*" (italics supplied).

Statement of the Case

The facts appear in the minutes of immigration hearing at Ellis Island on May 29, 1952, and are contained in file of the Immigration Service which is a part of appellee's return to the writ by reference, Record page 7.

Petitioners are husband and wife, and both are of Greek ethnic origin and nationality. The husband was born June 30, 1913 in Trapesund, Turkey, and was taken to Greece in 1922, when nine years of age, as a Greek repatriate. The wife was born December 28, 1923 in Rostov, Russia and was taken to Greece in November, 1938, when fourteen years of age, as a Greek repatriate.

Both were admitted lawfully to the United States as crew members on the steamship "Panagiotis Koumandaros", the female on July 4, 1951 at Newport News, Virginia, and the male on August 15, 1951 at Baltimore, Maryland, which were their last entries into the United States.

The male had served on vessels for a continuous period of at least fifteen years previously, including the dangerous war period, and on the S. S. "Panagiotis Koumandaros", the vessel on which he last arrived in the United States, for a continuous period of at least three years. He had made at least 30 entries into the United States as a seaman, all in pursuance of his calling, before his last entry upon which the warrants of arrest and deportation herein are predicated. He had at no time previously overstayed his leave and had always departed on the vessel on which he had arrived.

In 1950 petitioners agreed to enter into marriage with each other. However, since the vessel on which the male was employed was not scheduled for an early stop at a Greek port they arranged for the female to meet the male at Casablanca, French Morocco at a time when his ship

was scheduled to be there. As a result they were married in Casablanca on December 6, 1950.

The male had been employed on the S. S. "Panagiotis Koumandaros" since 1948. Desiring his wife to be with him, he arranged for her employment thereon as an assistant steward. From the time of her said employment (December 1950) until her last entry into the United States on July 4, 1951 at Newport News, she was continuously employed on said vessel, had made at least four entries as a seaman into the United States, had always departed with the vessel, and had never overstayed her leave.

During that period of about seven months the female conceived a child. Although pregnant, she continued in her employment on the S. S. "Panagiotis Koumandaros". However, on her fifth trip to the United States she was in her sixth month of pregnaney and became seriously ill. She needed medical attention, and when the vessel arrived at Newport News in July, 1951 she decided to seek medical advice because of her distressed condition. She proceeded to New York by bus and consulted Dr. C. Paul O'Connell at the Harkness Pavilion at the Medical Center on July 23, 1951. His certificate, which is a part of the record, states " * * * that no woman at this stage of pregnancy should undertake ocean voyages, as it places them too far from adequate medical care in the event of an obstetrical emergency".

It was only because of her aggravated condition and the advice of her doctor that a return to her duties on ship would imperil both her life and that of her expected child that she decided to remain ashore until her child was born. This is confirmed by her husband's action—he did not leave the ship with his wife. To the contrary, he continued his employment and departed with the vessel in the hope that upon the next arrival of his ship in the United States his wife would be in condition to rejoin him. His

next arrival was at Baltimore, Maryland on August 15, 1951 and he went ashore with the intention of reshipping. It was only after he saw his wife, learned the seriousness of her condition, and heard her pleas that he remain with her until the birth of their child, since they had neither relatives nor friends in the United States, that he decided to remain ashore with her.

Only after their child was born on November 11, 1951 did they conceive the hope that they could remain in the United States to give their child the educational, spiritual and material benefits available to him here but not in Greece, where economic conditions have been so bad for years as to necessitate the enactment by our Congress, successively, of the Displaced Persons Act and the present Refugee Relief Act to relieve that greatly overcrowded and distressed country, and others similarly situated.

During the four years which have elapsed since their entries in the summer of 1951, they have been wholly self-supporting, have established a comfortable home for themselves and their American citizen child, have been law-abiding, and in every way have comported themselves as good members of the community in which they have lived.

On January 4, 1952, less than two months after the birth of their child, they voluntarily disclosed their presence in the United States and made and filed with the New York office of the Immigration Service formal applications for suspension of deportation pursuant to the provisions of Section 19(c)(2) of the Immigration Act of February 5, 1917 (8 U. S. C. 155(c)(2)), which provides:

> "(c) In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien * * * if he finds (a) that such deportation would result in

serious economic detriment to a citizen or legally resident alien who is the * * * minor child of such deportable alien; * * *."

Thereafter on April 9, 1952 warrants of arrest in deportation proceedings issued against both, and on May 29, 1952 they were accorded a hearing thereunder at Ellis Island.

At the conclusion of said hearing of May 29, 1952 at Ellis Island, the Hearing Officer made a decision, App. 8a, in which he stated:

"Both respondents have applied for suspension of deportation on the ground of the economic detriment that would befall their minor son in the event they were deported. They have asked in the alternative for voluntary departure in lieu of deportation. Both disclaim having a criminal record anywhere and both allege that they have been persons of good moral character. Evidence of record would tend to corroborate their testimony in this respect. Their only income is from the employment of the male respondent on two jobs, the one as a salesman and the other as a superintendent of the apartment house in which they live. His combined income amounts to approximately $64.00 a week. Their joint assets consist of savings in the sum of about $500.00 and their furniture and other personal property which they value at $1500.00. While it would seem that their son, who was born in New York City in November 1951 would suffer economically if his parents should be deported, it is not believed that as a matter of administrative discretion the respondents' applications for suspension of deportation should be granted. They have been in the United States for a period of less than one year. They have no relatives in this country other than each other and their son. To grant both this form of relief upon the

accident of birth in the United States of their son would be to deprive others who are patiently awaiting visas under their already oversubscribed quotas."

He assigned no other reason whatsoever for the denial of suspension of deportation and failed to mention that such "accident of birth" made the child a citizen of the United States under the Constitution. His last quoted sentence is at utter variance with the true facts because, in enacting Subsection (c) of 8 U. S. C. 155, Congress very carefully provided that in cases wherein suspension of deportation was granted, the deportation proceedings should be cancelled, and that:

> "Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 212 of this title, for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: Provided, *that no quota shall be reduced by more than 50 per centum in any fiscal year.*"

At the conclusion of said hearing, both appellants appealed to the Board of Immigration Appeals from said decision. The Board heard said appeals on January 23, 1953, and on March 18, 1954 made a decision denying suspension of deportation and dismissing the appeals, App. 13a, wherein it stated:

> "It is obvious that the American citizen infant child is dependent upon the alien parents for economic sup-

port, care and maintenance. Documentary and other evidence establish good moral character for the requisite period. The aliens have no connection with subversive groups." • • •

"Notwithstanding the fact that the family situation in the case before us is similar to the situation in the case last referred to by counsel, in which a decision was made in 1951; and notwithstanding the fact that the deportation of these respondents would result in a serious economic detriment to an American citizen infant child, the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a matter of administrative discretion. We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed."

The irony of the situation becomes apparent when it is noted that, in support of the proposition that the granting or withholding of the privilege of suspension of deportation is a matter of administrative discretion, the Board cites two cases, *Weddeke* v. *Watkins,* 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy,* 180 F. 2d 489. In each of these cases the manner in which the discretionary power was exercised was controlled by a fact inherent in the case and appearing in the record—Weddeke had been convicted of Incest upon an infant child, and Kaloudis had been a member of the International Workers Order, a red organization. In the instant case, as stated by both the Hearing Officer and the Board, the petitioners are and always have been persons of good moral character, and the record does not contain a single word of evidence to the contrary.

As neither the Hearing Officer's said decision nor the Board's said decision assigned any reason for same, and

as they were totally unsupported by any evidence adduced at the hearing, a motion was made before the Board of Immigration Appeals to reopen and reconsider the matter, and on May 5, 1954 the Board made a decision, App. 17a, in which it stated:

> "Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. *It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted* (June 27, 1952). We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended."

Here, for the first time, the real reason for the Board's action appears. Instead of considering and deciding the case solely under the provisions of Section 19(c) of the Immigration Act of 1917, as amended, 8 U. S. C. 155(c), the Board erroneously based its decision upon what it believed was the intent of Congress in enacting the subsequent McCarran Immigration and Nationality Act of June 27, 1952 which, by the express provisions of its savings clause, Section 405(a), 8 U. S. C. 1101, note, provides that the provisions of the 1917 Act shall solely apply to applications for suspension of deportation pending prior to June 27, 1952.

Jurisdiction of the Courts Below

The District Court had jurisdiction herein under 28 U. S. C. 1651. The Court of Appeals had jurisdiction under 28 U. S. C. 1291.

Reasons for Allowance of the Writ

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. The majority opinion herein cites no decision of this Court in support thereof.

The majority opinion of the Court of Appeals herein is in conflict with that Court's previous decisions in *Mastrapasqua* v. *Shaughnessy,* 180 F. 2d, 999-1004, and *Zacharias* v. *Shaughnessy,* 221 F. 2d 578, and, by implication, the decision of this Honorable Court in *U. S.* v. *Menasche,* 348 U. S. 528, 535, as indicated by Judge Frank in his dissenting opinion herein.

POINT I

Petitioners have been denied due process of law, and the decision is not supported by the evidence.

On July 14, 1955, petitioners instituted the present habeas corpus proceeding, which the District Court below, Honorable Archie O. Dawson, U. S. D. J., dismissed on August 1, 1955 with an opinion, App. 2a, in which he stated:

> "Prior to the final determination of this matter by the Board of Immigration Appeals, Congress had enacted the Immigration and Nationality Act, of 1952. Under the 1917 Act, as amended, the applicant for suspension of deportation had to show 'serious economic detriment.' Under the 1952 Act, the appli-

cant would have to show that the deportation would 'result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child,' 8 U. S. C. Sec. 1254(a)(1).

In the consideration of the 1952 Act in Congress, this change in the test to be applied to suspension of deportation was considered. The Senate Judiciary Committee, in its report on the Bill which subsequently became law, said:

> 'The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation.' • • •.

The Attorney General, in exercising his discretion, could take into account the new standard which was laid down by Congress. The new standard was referred to in the decision of the Board of Immigration Appeals of May 5, 1954."

This is error. In his dissenting opinion herein Judge Frank stated:

> "Judge Dawson, in dismissing the habeas corpus writ recognized that the Board took 'into account the new standard which was laid down by Congress,' and held that the Board, in so doing, acted properly.
>
> Here the Board erred. The new statute narrowed the discretion of the Attorney General and thus of his delegate, the Board. Thus the Board did not feel free to exercise the discretion it had under the properly applicable legislation, i. e., the statute as it stood before the 1952 amendment. However,

> the new Act, as my colleagues concede, had no application to this case. Accordingly, it was precisely as if the Board, without relying on the amended Act, had declared that it would never grant discretionary relief unless deportation would 'result in exceptional and extremely unusual hardship to the alien, his spouse, parent or child.' Such a restriction by the Board of the breadth of its discretion was arbitrary and therefore illegal."

At the bottoms of pages 5 and 6 of his opinion, Judge Dawson quotes from a report made by the Senate Judiciary Committee prior to the enactment of said inapplicable 1952 Act, to support the foregoing erroneous conclusion. However, if it is at all necessary to examine the intent of Congress herein, it should be done with regard to that of the 76th Congress which enacted the Alien Registration Act of 1940, which amended said Section 19 of the Act of 1917 by adding thereto Subsection (c), the applicable provision of law in the instant case, as continued in force by said Section 405(a) of the McCarran Immigration and Nationality Act of June 27, 1952, 8 U. S. C. 1101 Note.

House Report No. 2683 of the Conference Committee dated June 21, 1940 to accompany H. R. 5138, to amend Section 19 of the Act of February 5, 1917 by adding Subsections (c) and (d) thereto, states at page 9:

> "Subsection (c) provides that certain cases, generally those in which aliens are deportable solely because of illegal entry, the Attorney General may allow aliens to depart at their own expense, or may, subject to congressional review, *suspend orders of deportation where deportation would result in unwarranted hardship.*"

On the basis of that Conference Report the Senate and House enacted said amendment, and on June 28, 1940 the

President approved same, which, insofar as relevant to the instant case, reads as follows:

> "(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who proved good moral character for the preceding five years, the Attorney General may * * * suspend deportation of such alien * * * if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien."

The very language indicates that its purpose was and is to protect the American citizen or legally resident alien dependent on the deportable alien, and not such deportable alien. It remained unchanged during the ensuing 12 years until June 27, 1952, when the McCarran Act was enacted, and continued it in force as to cases pending on June 27, 1952.

That the Board of Immigration Appeals has so construed it is clear from its numerous decisions thereunder.

On July 21, 1944, file 56111/780, the Board ruled to the effect that serious economic detriment exists if the effect of deportation of the applicant would be substantially to lower the standard of living of the dependent relative.

On May 15, 1943, file 56050/380, it ruled to the effect that when an alien has property worth $300 and takes care of her home and looks after the needs of her two American-born minor children, deportation would work serious economic detriment to the children, although the family receives $62.50 of public funds monthly for its maintenance.

On March 13, 1943, file 55834/444, it ruled to the effect that when an alien minor child is dependent on her United

States citizen mother whose income is $30 per month, deportation of the child would result in serious economic detriment to the mother, for the mother then would be required to maintain two households from her income.

On March 30, 1943, file 56093/577, it ruled to the effect that the fact that an alien does not earn sufficient income to support his relatives, who must rely on public funds for the remainder of their maintenance, is not sufficient to deny favorable consideration of his application for suspension of deportation, as to deport him would cause the loss of whatever income he does earn and increases the burden upon relief authorities.

On March 31, 1943, file 55930/335, it ruled to the effect that an alien woman, who lives with and is completely occupied in the upbringing of her minor native-born citizen children, the family being supported by public relief funds in the absence of her husband, is performing services of economic value and her deportation would result in a serious economic detriment to her minor children.

In *In re Emilio Consigliero,* A-2146468, decided by the Board on October 9, 1947, suspension of deportation had been denied by both the Hearing Officer and the Central Office because of certain acts on the part of the respondent, and in reversing the decision below the Board stated:

> "And in this connection we must remember that *we are not concerned with the respondent as an individual but as a head of an American family.*"

The case of *Mariangoula T. Tsolainos,* A-6250408, decided by the Board on November 25, 1949, is directly in point. That case involved a Greek citizen who was admitted as a visitor for six months. One month after her arrival she married a Greek citizen, then illegally in the United States. A male child was born of that union. The mother applied for suspension of deportation. The Central Office

denied the application. The Board of Immigration Appeals reversed and granted suspension, adopting the view of counsel that:

> "As a matter of ordinary common sense, no one could possibly take the position that the loss of a two year old's mother would not be a serious detriment to the child because no amount of nurses, governesses and pediatricians could take the place in this or any child's life of the love and care of his mother. On the other hand, if the child were to be taken to Europe he would be forced to suffer the detriment of being brought up in a foreign land * * *.
>
> This Board has given careful consideration to all the evidence of record, as well as all of the representations of counsel, and to the decision of the Assistant Commissioner of Immigration and Naturalization, and it is our conclusion that to enforce the departure of this appellant from the United States would in our opinion result in a serious economic detriment to this minor United States born child, particularly in the light of the condition of the quota of Greece, as well as the present chaotic conditions abroad, particularly in the country of the alien's nativity * * *."

In each of the above cases the aim was to avoid depriving the citizen dependent of the support of the deportable alien, no matter how meager the contribution might be. The citizen dependent's welfare, not that of the deportable alien, was and is the prime consideration, and each of said cases carried out the purpose and intent of the statute.

On December 24, 1952 his Honor, Judge Bondy, rendered an opinion in *Avgerinos* v. *Shaughnessy,* Civ. 79-104, in which he stated:

> "* * * The relator does not question his deportability. The sole question is whether suspension

may be denied as a matter of discretion without disclosing the evidence on which the denial is based and without even disclosing the conclusion drawn from the undisclosed confidential information. • • •

The District Court for the District of Columbia held in *Alexiou* v. *McGrath*, 101 F. Supp. 421 that although denial of relief is discretionary, nevertheless after the Attorney General had promulgated regulations establishing a procedure assuring a fair hearing on the issue of discretionary relief such procedure must be followed and that consideration of the confidential evidence without the disclosure thereof was error. See *U. S. ex rel. Salvetti* v. *Reimer*, 103 F. (2d) 777, 779; *U. S. ex rel. Weddecke* v. *Watkins*, 166 F. (2d) 369, 371; and the decision by this court in *U. S. ex rel. Bauer* v. *Shaughnessy*, Civ. 50-217 U. S. D. C., S. D. N. Y., July 28, 1949."

The petitioners herein are aliens who have entered the United States and they are entitled to due process of law, as was held by the Supreme Court in *Shaughnessy, District Director* v. *U. S. ex rel. Mezei*, 73 S. Ct. 625, in which, at page 629, it stated:

"(3-6) It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. *The Japanese Immigrant Case* (*Karou Yanataya* v. *Fisher*), 1903, 189 U. S. 86, 100-101, 23 S. Ct. 611, 614, 47 L. Ed. 721; *Wong Yang Sung* v. *McGrath*, 1950, 339 U. S. 33, 49-50, 70 S. Ct. 445, 453-454, 94 L. Ed. 616; *Kwong Hai Chew* v. *Colding*, 1953, 344 U. S. 590, 598, 73 S. Ct. 472, 478."

In the *Avgerinos* case, *supra*, Judge Bondy defines "due process of law", as applicable to cases such as the instant one, in the following language:

> "The regulations in effect at the time of the Board's decision, and still in effect, provide that: the hearing officer may at such time, as he deems appropriate, advise the alien of his right to apply for discretionary relief, 151.2(c); the alien may at any time during the hearing under the warrant apply for one or more forms of discretionary relief from deportation, 151.3(e). The hearing officer shall present at the hearing 'all available evidence concerning factors bearing upon statutory eligibility for discretionary relief', 151.2(c)(4), and such other information as may be pertinent to the issue of the case, 151.2(c)(5); the alien has a right to the presence of his counsel, and he or the counsel 'shall be permitted to offer evidence to meet any evidence adduced against the alien and to cross-examine witnesses.' 151.2(g); in addition he may submit any written or oral material which he believes should be considered in the exercise of discretion, 151.3(e); as soon as practicable after the hearing the hearing officer shall make 'a decision which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to deportability; if the alien has applied for discretionary relief . . . the decision shall also contain a discussion of the evidence relating to the alien's eligibility for such relief and the reasons for granting or denying such an application', 151.5(a); the decision shall be concluded with an order that the alien be deported, proceedings terminated or that discretionary relief be granted, 151.5(a)(c). Lastly, 151.2(b) expressly provides 'The hearing officer shall conduct a fair and impartial hearing.' (Part 151 as amended in 17 F. R. 4740, 4741.)

> These regulations clearly establish that they were enacted in order to assure a fair hearing as a basis for the exercise of discretion conferred upon the Attorney General. The regulations have the force of law and must be followed. *Bilokumsky* v. *Tod*, 263 U. S. 149, 155; *Bridges* v. *Wilson*, 326 U. S. 135; 153. See *U. S. ex rel. Salvetti* v. *Reimer*, supra; *U. S. ex rel. Weddecke* v. *Watkins*, supra.
>
> The hearing officer is required to present such information as may be pertinent to the issue of the case. If the exercise of discretion is based upon confidential evidence without disclosing even the ultimate conclusion drawn from that evidence, then the alien's right to refute any evidence adduced against him would be impaired and the alien's right to submit 'any written or oral material which he believes should be considered in the exercise' of the Attorney General's discretion likewise would be of little use. As the Board of Immigration Appeals and the District Court of the District of Columbia in the Alexiou case decided, the use of confidential evidence without any disclosure of its purport was contrary to the regulations and violated the rights of the relator. Had the disclosure been made the relator may have been able to introduce evidence disproving the truth of such information."

Most certainly the procedure in the case at bar does not meet requirements of the regulations so carefully enumerated in Judge Bondy's above quoted decision. The hearing officer and the Board both found that both petitioners were statutorily eligible for suspension of deportation, but, in denying same, failed utterly to assign any reason based upon the evidence adduced at the hearing, or otherwise, for such denial.

Therefore, petitioners were denied due process of law.

POINT II

The Attorney General's arbitrary exercise of discretion, or failure to exercise discretion under the applicable statute, is subject to judicial review.

In the return to the writ of habeas corpus herein, respondent stated in paragraph 15:

> "The denial by the Board of Immigration Appeals of the discretionary privilege of suspension of deportation, in the circumstances of these cases, is not subject to judicial review. (See *Kaloudis* v. *Shaughnessy*, 180 F. 2nd 489.) The granting of a joint executive and legislative 'pardon' from deportation is a matter of grace and is a discretionary matter wherein the courts may not intervene." (See also: *U. S. ex rel. Bartsch* v. *District Director*, 175 F. 2d 245; *U. S. ex rel. Ciannamea* v. *Neelly*, 202 F. 2d 289; *U. S. ex rel. Adel* v. *Shaughnessy*, 183 F. 2d 371; *U. S. ex rel. James* v. *Shaughnessy*, 202 F. 2d 519; *cert. denied* 345 U. S. 969; *U. S. ex rel. Matrauga* v. *Mackay*, 210 F. 2d 160, *cert. denied* 347 U. S. 967.)

However, an examination of the cited cases will show that in every one of them there was evidence adduced at the hearings which fully justified the manner in which the discretionary power was exercised against the alien's contention. No such evidence was adduced in the immigration proceedings in the case at bar.

Further, in 1950 the Court below held in *Mastrapasqua* v. *Shaughnessy*, C. A. N. Y. 1950, 180 F. 2d 999, that where Board of Immigration Appeals refused to exercise general discretionary power to grant deportable aliens a pre-examination as to right of re-entry or suspension of deportation, on sole ground that Italian applicant was an

alien whose presence within the United States was due solely to World War II, and that the Attorney General had decided without explanation that no discretionary relief should be accorded such persons, classification was capricious, and alien was entitled to release in habeas corpus proceeding unless within reasonable time set by the District Court discretion was exercised.

In 1953 the United States District Court for the District of Columbia, in *U. S. ex rel. Athanasopoulos* v. *Reid,* 110 F. Supp. 200, held that although Attorney General was vested with sole discretion to permit voluntary departure of aliens in lieu of deportation in situations specified by former Section 155 of Title 8, omissions from record and exclusion by hearing officer of competent evidence constituted an infringement of law in that reviewing authority had no basis upon which to exercise discretion.

The two last cited decisions are in accord with a long line of decisions running back through the last century, and they, together with Judge Bondy's said decision of December 24, 1952, Civil 79-104, in *Avgerinos* v. *Shaughnessy, supra,* and that of the District Court for the District of Columbia in *Alexiou* v. *McGrath,* 101 F. Supp. 421 (1951), *supra,* completely nullify the above-quoted contention of the respondent herein.

In the instant case there has been a total failure to properly exercise discretion, and no evidence was adduced at the immigration hearing to support the erroneous decision herein.

CONCLUSION

It is respectfully submitted that the various questions raised are of such importance in the administration of Federal Law that there should be an authoritative determination of same by this Court. Accordingly, petitioners ask that this Court issue a writ to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

EDWARD L. P. O'CONNOR,
Attorney for Petitioners,
135 Broadway,
New York, N. Y.

JAY NICHOLAS LONG,
of Counsel.

Appendix A

(Opinion of District Court)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances:

JAY NICHOLAS LONG, of New York, N. Y., Attorney for Relators.

LLOYD F. MACMAHON, United States Attorney for the Southern District of New York, Attorney for Respondent; LESTER FRIEDMAN, Attorney in the Office of the District Counsel, Immigration and Naturalization Service, Department of Justice, of Counsel.

DAWSON, *D. J.*:

This matter, brought up by the issuance of a writ of habeas corpus, involves the question as to whether the denial to petitioners of suspension of deportation by the Attorney General was an abuse of discretion by the Attorney General.

The undisputed facts show that the relators are citizens of Greece who are now illegally in the United States. They last entered the United States in 1951 as members of a crew of a Greek steamship. They were granted shore leave for the period of time the vessel on which they arrived remained in port, but in no event to exceed twenty-nine days. They failed to depart from the United States before

the expiration of their period of temporary admission and did not apply for any extension of this period.

In April, 1952, warrants of arrest were duly issued by the District Director of Immigration and Naturalization charging that the relators were unlawfully in the United States and subject to deportation. A hearing was accorded to the relators. The Hearing Officer made his decision, finding both relators deportable and denying their applications for suspension of deportation. An appeal was taken to the Board of Immigration Appeals, and that Board, on March 18, 1954, made an order denying their applications for suspension of deportation and dismissing their appeal. They were given permission to depart voluntarily from the United States.

Relators did not depart from the United States, but on April 19, 1954, filed a motion addressed to the Board of Immigration Appeals requesting that the proceedings be re-opened and their applications for suspension of deportation reconsidered. On May 5, 1954, the Board of Immigration Appeals denied relators' motion. They were given until August 20, 1954 within which to avail themselves of the privilege of voluntary departure. On May 11, 1955, they submitted another motion addressed to the Board of Immigration Appeals asking that the administrative proceedings be re-opened and their application for suspension of deportation reconsidered. These motions were denied by the Board of Immigration Appeals on June 3, 1955.

On July 12, 1955, relators submitted an application that their deportation be stayed on the ground that the deportation could possibly endanger the life of the relator Elizabeth Hintopoulos and would involve "the possible loss of the unborn child with whom she is now in the fifth month of pregnancy". On July 13, 1955, this relator was examined by a surgeon of the United States Public Health Serv-

ice who certified that she was able to travel without danger to life; that she required no immediate medical treatment, and that she could travel aboard a vessel having a physician aboard. Thereupon, relators' application for a stay of deportation was denied and they were taken into custody for deportation.

Relators do not deny that they are illegally in the Country and are subject to deportation. They urge, however, that they were eligible for suspension of deportation under the provisions of § 19(c) of the Immigration Act of 1917, as amended, and that the refusal of the Attorney General to suspend deportation under the provisions of this statute was an abuse of discretion.

The respondent admits that relators came within the category of the persons for whom the Attorney General might suspend deportation. Respondent urges, however, that the suspension of deportation under the provisions of this statute is purely a matter of the discretion of the Attorney General; that the Attorney General exercised his discretion and did not exercise it capriciously or arbitrarily.

It is well established that the Courts may not review the exercise of such discretion by the Attorney General, and that they may interfere only where there has been a clear abuse of discretion or a clear failure to exercise discretion. In such cases, the Court can do no more than to require that the discretion be properly exercised. *United States ex rel. Kaloudis* v. *Shaughnessy* (C. A. 2, 1950), 180 F. 2d 489; *United States ex rel. Adel* v. *Shaughnessy* (C. A. 2, 1950), 183 F. 2d 371; *United States ex rel. James* v. *Shaughnessy* (C. A. 2, 1953), 202 F. 2d 519, cert. den. 345 U. S. 969.

The administrative record which was submitted in connection with this proceeding shows that the Board of Immi-

gration Appeals recognized that relators had established the statutory requirements for discretionary suspension of deportation under § 19(c) of the Immigration Act of 1917, as amended, and that the Board recognized that the deportation of relators might result in "serious economic detriment" to their citizen minor child. After considering these matters, however, the Board denied the suspension of deportation as a matter of administrative discretion.

Prior to the final determination of this matter by the Board of Immigration Appeals, Congress had enacted the Immigration and Nationality Act, of 1952. Under the 1917 Act, as amended, the application for suspension of deportation had to show "serious economic detriment". Under the 1952 Act, the applicant would have to show that the deportation would "result in exceptional and extremely unusual hardship to the alien or to his spouse, parent, or child", 8 U. S. C. § 1254(a)(1).

In the consideration of the 1952 Act in Congress, this change in the test to be applied to suspension of deportation was considered. The Senate Judiciary Committee, in its report on the Bill which subsequently became law, said:

> "The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation." *

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* The Senate Judiciary Committee stated in Senate report No. 1137, with reference to the Bill which subsequently became law, as follows:

> "The term 'exceptional and extremely unusual hardship' requires some explanation. The committee is aware that in almost all cases of deportation, hardship and frequently unusual

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The Attorney General, in exercising his discretion, could take into account the new standard which was laid down by Congress. The new standard was referred to in the decision of the Board of Immigration Appeals of May 5, 1954. The Board in that opinion recognized that the deportation might result in "serious economic detriment to the American-born infant child", but concluded that this was not alone enough to warrant suspension of deportation. The Board pointed out that the child at the time of the decision in 1954 was about two and one-half years old;

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hardship is experienced by the alien or the members of his family who may be separated from the alien. The committee is aware, too, of the progressively increasing number of cases in which aliens are deliberately flouting our immigration laws by the processes of gaining admission into the United States illegally or ostensibly as non-immigrants but with the intention of establishing themselves in a situation in which they may subsequently have access to some administrative remedy to adjust their status to that of permanent residents. The practice is grossly unfair to aliens who await their turns on the quota waiting lists and who are deprived of their quota numbers in favor of aliens who indulge in the practice. This practice is threatening our entire immigration system and the incentive for the practice must be removed. Accordingly, under the bill, to justify the suspension of deportation the hardship must not only be unusual but must also be exceptionally and extremely unusual. The bill accordingly establishes a policy that the administrative remedy should be available only in the very limited category of cases in which the deportation of the alien would be unconscionable. Hardship or even unusual hardship to the alien or to his spouse, parent, or child is not sufficient to justify suspension of deportation. To continue in the pattern existing under the present law is to make a mockery of our immigration system." (Quoted in "Commentary on the Immigration and Nationality Act" by Walter M. Besterman, Legislative Assistant, Committee on the Judiciaries, House of Representatives, Vol. 8 U. S. C. p. 67.)

that the parents had been in the United States for a period of less than three years; that both had arrived in this Country as seamen; that they have no other dependents or close family ties here, and the male relator may be able to obtain work as a Greek seaman and earn about $85. per month.

Under the circumstances, it appears clear that the Board of Immigration Appeals, acting for and on behalf of the Attorney General, exercised its discretion; that it did not capriciously exercise its discretion or abuse its discretion. Under the circumstances, this Court has no power to review this exercise of discretion by the Attorney General.

The writ of habeas corpus is dismissed. So ordered.

Dated: New York, N. Y., August 1, 1955.

ARCHIE DAWSON,
U. S. D. J.

Appendix B

(Opinion of United States Court of Appeals, For the Second Circuit)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 144—October Term, 1955.

(Argued October 10, 1955 Decided May 9, 1956.)

Docket No. 23809

UNITED STATES OF AMERICA, *ex rel.* ANASTASIOS HINTOPOULOS and ELIZABETH HINTOPOULOS,
Relators-Appellants,

against

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization at the Port of New York,
Respondent-Appellee.

Before:

FRANK, HINCKS and WATERMAN,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Archie O. Dawson, *Judge*, dismissing a writ of habeas corpus. Affirmed.

JAY NICHOLAS LONG, New York, N. Y., for Relators-Appellants.

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TERESA S. REARDON, Asst. U. S. Atty., S. D. N. Y. (Paul W. Williams, U. S. Attorney, S. D. N. Y.; Roy Babitt, Attorney, Immigration and Naturalization Service, on the brief), for Respondent-Appellee.

HINCKS, *Circuit Judge*:

This appeal from an order dismissing a writ of habeas corpus turns upon the validity of an order of the Board of Immigration Appeals denying the appellants' request for suspension of deportation.

The facts are substantially as follows. The appellants are husband and wife, both Greek citizens. Both were admitted to the United States as seamen, the wife at Newport News, Virginia, on July 4, 1951 and the husband at Baltimore, Maryland, on August 15, 1951. At the time the female entered the United States she was six months pregnant and journeyed to New York to seek medical advice where her husband joined her at the later date when his ship next arrived in the United States. Their child was born in the United States on November 11, 1951 and thus by reason of his nativity is an American citizen. On January 4, 1952, the appellants voluntarily disclosed their illegal presence and made application to the Immigration Service for suspension of deportation. On April 9, 1952, warrants issued for their arrest in deportation proceedings, and on May 29, 1952 they were accorded a hearing thereunder at Ellis Island. The Hearing Officer found them deportable for entry into the United States with intent to remain indefinitely without possession of immigration visas, and denied their application for suspension of deportation. The Board of Immigration Appeals affirmed the decision of the Hearing Officer in an opinion dated March 18, 1954. On May 5, 1954, the Board reiterated its conclusion in denying a motion to

reopen the proceedings. Thereafter, the appellants were taken into custody for deportation and a writ of habeas corpus was issued on July 14, 1955. On August 1, 1955, the United States District Court for the Southern District of New York, per Dawson, *J.*, dismissed the writ and upheld the decision of the Board as a proper exercise of the Attorney General's discretionary power to grant or deny the relief requested. The present appeal is prosecuted from the dismissal of the writ below.

On this appeal, as below, the appellants do not question their deportability. Their attack on the administrative order is confined to so much thereof as denied their request for suspension of deportation. As to this the applicable statute is the Immigration and Nationalty Act of June 23, 1940, c. 439, § 20(c) (which amended 39 Stat. 889) which, so far as here pertinent, provides:

> "In the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may suspend deportation of such alien * * * if he finds that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the * * * minor child of such deportable alien."

It is clear that under this statute the "good moral character" of the appellants for five years and resultant "serious economic detriment [to] their minor child" were essential qualifications for the eligibility of these appellants for suspension of their deportation. In the administrative proceedings it was found that both these qualifications existed and that the appellants were indeed eligible. Notwithstanding, the Attorney General, through the Board of Immigration Appeals as his administrative delegate, in the

exercise of the discretion vested in him by the Act, refused to grant a suspension.

To determine the validity of that action we look first to the opinion of the Board of Immigration Appeals of March 18, 1954. In that opinion, its Board took note of the financial condition of the appellants and went on to say:

> "• • • It is obvious that the American citizen infant child is dependent upon the alien parents for economic support, care and maintenance. Documentary and other evidence established good moral character for the requisite period. The aliens have no connection with subversive groups."

It concluded its opinion with these two paragraphs:

> "As stated above, we have, in the instant case, a family consisting of two alien parents illegally residing in the United States and one American citizen child, age about two and one-half years. These respondents have been in the United States for a period of less than three years. Both arrived in this country as seamen. They have no other dependents or close family ties here. The record indicates that the male respondent may be able to obtain work as a Greek seaman and earn about $85 monthly.
>
> "Notwithstanding the fact that the family situation in the case before us is similar to the situation in the case last referred to by counsel, in which a decision was made in 1951; and notwithstanding the fact that the deportation of these respondents would result *in a serious economic detriment to an American citizen infant child,* the granting or withholding of maximum discretionary relief depends on the factors and merits in each individual case, and is a

matter of administrative discretion.[1] We have carefully examined the facts and circumstances in the instant case and we find that the granting of the maximum relief is not warranted by the record in the case. The appeals will be dismissed.

* * *

The emphasis which we have added to the second paragraph just quoted shows unmistakably that the Board recognized that the applicable hardship test of eligibility was "a serious economic detriment to an American citizen," which was the precise test of eligibility for suspension provided in the applicable statute from which we quote above. On that basis, it found that the appellants were in all respects eligible for suspension. But in the belief that the exercise of its discretion under the statute "depends on the factors and events in each individual case" the Board denied suspension as "not warranted by the record in this case."

We see nothing in the opinion, or indeed in the underlying record, to suggest that the determination was arbitrary or based on irrelevant or improper considerations. We cannot say as a matter of law that if, as a result of the parents' deportation, the minor child shall be reared, say, in Athens instead of in Brooklyn, that the resulting economic detriment to the child—which was recognized—is a factor of sufficient gravity to withhold the deportation of aliens who had entered this country with intent to remain indefinitely, in violation of the immigration laws, less than a year before the decision of the Hearing Officer which first ordered their deportation. We conclude that under our former decisions which the Board cited in its March 18th opinion—*Weddeke* and *Kaloudis*—the Board's action would

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"[1] *Weddeke* v. *Watkins*, 166 F. 2d 369; and *Kaloudis* v. *Shaughnessy*, 180 F. 2d 489."

have been unassailable if the administrative proceedings had stopped there. That conclusion is further supported by *United States, ex rel. James* v. *Shaughnessy*, 2 Cir., 202 F. 2d 519; *United States, ex rel. Adel* v. *Shaughnessy*, 2 Cir., 183 F. 2d 371; *United States, ex rel. Sleddens* v. *Shaughnessy*, 2 Cir., 177 F. 2d 363.

But thereafter the appellants made a motion to reopen the proceedings for reconsideration of the prior applications for suspension. This motion the Board denied with a short opinion dated May 5, 1954. In that opinion, it said:

> "Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted. We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended."
>
> • • •
>
> "Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied."

By these two paragraphs the Board made it abundantly clear that it adhered to its previous holding that the ap-

pellants' eligibility for a suspension was controlled by the 1940 Act; that under that Act the appellants were indeed eligible; and that *in the exercise of its discretion* it denied the suspension applied for. Having thus stated that its decision was made in the exercise of its discretion, we see no room whatever for the argument that the Board had failed or refused to exercise its discretion. In this respect, the case here is distinguishable from *Mastrapasqua* v. *Shaughnessy*, 2 Cir., 180 F. 2d 999, in which the Board had refused to exercise its discretion. And since the Board found the appellants eligible for a suspension under the eligibility standard of the 1940 Act, its decision was not in conflict with our decision in *United States ex rel. Zacharias* v. *Shaughnessy*, 221 F. 2d 578.

The only remaining question is whether in its May opinion the reference to Section 244(a) of the Immigration and Nationality Act of 1952 indicates that in the formulation of its discretion the Board was improperly influenced by Congressional policy as manifested by the later Act. As to this, it will be noted that neither the 1940 Act nor the 1952 Act provide any indication of the factors which shall control the formulation of the discretion granted: under each, once the respective eligibility requirements are found to exist—as they were here—the Board has untrammeled discretion to grant or withhold a suspension. Only if the discretion is shown to have been formulated on arbitrary or illegal considerations may the courts interfere. *United States ex rel. Kaloudis* v. *Shaughnessy*, 2 Cir., 180 F. 2d 489. This broad discretionary power was apparently granted in order to give the deportation provisions of the law some flexibility in cases involving more than usual hardship, the nature and gravity of which would vary with each case as it should thereafter arise. The appellants do not contend that the grant of discretion is unconstitutional

for lack of specified standards governing its formulation. Such a contention, even if sound, would not help them. For if the grant of power were invalid, the appellants and all other hardship cases would stand confronted with rigid deportation provisions as were their predecessors before the law was liberalized.

Since the Board had this broad power (in the comparatively narrow field which comprises those found eligible for a suspension) we think that in the formulation of its discretion it might properly take into account among other factors its concept of Congressional policy as manifested in Section 244(a) of the 1952 Act. In *United States ex rel. Kaloudis* v. *Shaughnessy, supra,* at page 491, we said:

> "* * * The power of the Attorney General to suspend deportation is a dispensing power, like a judge's power to suspend the execution of a sentence, or the President's to pardon a convict. It is a matter of grace, over which courts have no review, unless—as we are assuming—it affirmatively appears that the denial has been actuated by considerations that Congress could not have intended to make relevant."

Let us somewhat develop the analogy there suggested by posing the situation which may confront a judge when he comes to impose sentence on, say, a convicted narcotic peddler. He is besought to dispose of the case by suspension of sentence and imposition of probation as under the applicable law he has power to do. In the exercise of his discretion he refuses to suspend and imposes a sentence to be served. Surely the sentence imposed is not invalid because his discretion was to some extent expressly affected by prevalent contemporary opinion that the public interest required more rigorous treatment of narcotic violators, whether such opinion was disclosed in recent Acts of Con-

gress stiffening the penalties for such violators or merely in the public press. Doubtless a just judge will not abdicate his powers to public clamor or even to legislative opinion which does not purport to control formulation of his discretionary powers. But a wise judge will not put forth judgments from an ivory tower shutting his eyes to contemporary *mores* and public opinion.

Our conclusion is not in conflict with Section 405 of the 1952 Act. That section provides that "Nothing contained in this Act * * * shall be construed to affect any proceedings * * * brought * * * at the time this Act shall take effect; *but* as to all such * * * proceedings * * * *the statutes* * * * *repealed* by this Act *are* * * * *hereby continued in force* and effect." (Emphasis supplied.) We think that "nothing contained in this Act" means *no operative provision* of this Act such as the provision establishing the standard of eligiblity. Cf. *United States ex rel. Zacharias* v. *Shaughnessy, supra.* That construction is required by the succeeding, antithetical, clause, "*but* as to all such * * * proceedings * * * the statutes repealed" are continued in effect. In other words, under Section 405 of the 1952 Act the appellants were entitled to have the application disposed of under the 1940 Act. And that right was fully accorded them. They were found eligible for suspension under the 1940 Act and the suspension was denied under the discretionary power created by the 1940 Act. The reference to Section 244(a) of the 1950 Act showed only that the Board considered its exercise of discretion to be consonant with the policy of that Act—not that the scope of its discretionary power was restricted by that Act.

Affirmed.

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FRANK, *Circuit Judge* (Dissenting):

When this court, on a petition for rehearing publishes a supplemental opinion which adheres to the previous decision, but on new grounds, the new opinion with its new rationale is invariably and correctly taken, by us and others, as reporting the basis of our decision. I think we must deal similarly with the Board. Accordingly, I think we must look to its second opinion, responsive to the motion for reconsideration, to learn the basis on which the Board refused to exercise its discretion favorably to appellants.

The Board's second opinion is set forth in full in the Appendix hereto. There the Board plainly stated, as follows, that it relied on Section 244(a) of the 1952 Act: "It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted."

Judge Dawson, in dismissing the habeas corpus writ recognized that the Board took "into account the new standard which was laid down by Congress", and held that the Board, in so doing, acted properly.

Here the Board erred. The new statute narrowed the discretion of the Attorney General and thus of his delegate, the Board. Thus the Board did not feel free to exercise the discretion it had under the properly applicable legislation, *i.e.*, the statute as it stood before the 1952 amendment. However, the new Act, as my colleagues concede, had no application to this case. Accordingly, it was precisely as if the Board, without relying on the amended Act, had declared that it would never grant discretionary relief unless deportation would "result in exceptional and extremely unusual hardship to the alien, his spouse, parent or child." Such a restriction by the Board of the breadth of its discretion was arbitrary and therefore illegal.

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This case is like *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 999, 1002-1004 (C. A. 2). There, an Italian seaman, detained in this country, during the war, sought the discretionary relief of pre-examination or, in the alterative, suspension of deportation. The Board of Immigration Appeals refused to exercise its discretion because Mastrapasqua was in a class of aliens (those in the United States solely for reasons connected with the war) which the Attorney General, in a prior case, had said should be denied discretionary relief. We held that the Board was not justified in so refusing to exercise its discretion in this class of cases, since the classification was irrational and capricious, and we ordered Mastrapasqua's release from custody unless the Board, within a reasonable time, exercised its discretion one way or the other, without reliance on any such limitation on its discretion.

My colleagues lean heavily on *U. S. ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491 (C. A. 2) which suggested that the Attorney General's discretionary power to suspend deportation might be analogized to the President's power to pardon a convict. It should be noted that the *Mastrapasqua* case was decided by us less than two weeks after we decided *Kaloudis*. As the two must therefore be read together, it cannot be argued that the earlier decision (*Kaloudis*) over-ruled the later (*Mastrapasqua*) or vice versa. Moreover, in *Kaloudis*, although we said that there the denial of discretionary relief rested on a ground that was not improper, we indicated that cases might arise where the discretionary power is exercised in disregard of implied limitations. See 180 F. 2d at 490.

Kaloudis did not say that the Board, in exercising its discretion, could apply a standard which Congress specifically said was not to be applied to cases, such as this, which come within the savings clause of Section 405 of the

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Immigration and Nationality Act of 1952, 66 Stat. 280.[1] In interpreting Section 405 in connection with the application of the pre-1952 test for determining eligibility of an alien for citizenship, the Supreme Court said, in *United States* v. *Menasche,* 348 U. S. 528, 535, "The whole development of this general savings clause, its predecessors accompanying each of the recent codifications in the field of immigration and naturalization, manifests a well-established congressional policy not to strip aliens of advantages gained under prior laws. The consistent broadening of the savings provision, particularly in its general terminology, indicates that this policy of preservation was intended to apply to matters both within and without the specific contemplation of Congress."

In *United States ex rel. Zacharias* v. *Shaughnessy,* 221 F. 2d 578 (C. A. 2), this court, adopting the liberal view of the savings clause set forth in *Menasche,* held that the eligibility of an alien who came within the clause, for the discretionary relief of voluntary departure, was to be determined under the pre-1952 statute. I think that the same considerations which caused us to so hold in *Zacharias* require that we now order the Board to exercise its discretion in determining whether to suspend the deportation of petitioners without regard to the new and more severe standard adopted by Congress in the 1952 Act.

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[1] Section 405, in part, reads "*Nothing* contained in this Act, unless specifically provided therein, shall be construed to affect any prosecution, suit, action or proceedings, civil or criminal, brought * * * at the time this Act shall take effect; but as to all such * * * proceedings * * *, the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect * * * An application for suspension of deportation under Section 19 of the Immigration Act of 1917, as amended, * * * shall be regarded as a proceeding within the meaning of this subsection." (Emphasis added.)

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APPENDIX

These cases are before us on counsel's motion to reopen the proceedings for reconsideration of the respondents' applications for suspension of deportation.

The male respondent last entered the United States on August 15, 1951 and the female respondent on July 4, 1951. Both arrived as seamen and have been found deportable on the charge that they were immigrants at the time of entry and were not in possession of immigration visas. They have one child who was born in the United States during November 1951. On March 18, 1954, we dismissed the appeals of the respondents from the hearing officer's decision granting voluntary departure and denying suspension of deportation. After considering all the facts in the case at that time, we denied suspension of deportation as a matter of administrative discretion.

Counsel's motion sets forth no matters of which we were unaware at the time our previous decision was rendered. (It is crystal clear that Congress intended to greatly restrict the granting of suspension of deportation by the change of phraseology which was used in Section 244(a) of the Immigration and Nationality Act as well as the Congressional comment at the time this provision was enacted.) We indicated in our previous order that the deportation of the respondents would result in a serious economic detriment to their citizen minor child, and we do not question that the respondents have established the statutory requirements for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended.

Counsel argues that the two court decisions cited in our previous order involved grounds for deportation specified in Section 19(d) of the Immigration Act of 1917, as amended. These cases were not within the purview of Section 19(d) although one alien had been convicted of incest and the

other had been a member of the International Workers Order. Weddeke was not deportable because of his conviction and Kaloudis was not charged with being deportable because of his membership in the International Workers Order. In both cases, the decision of the court was predicated on the fact that, regardless of whether the aliens had established or could establish statutory eligibility, the question of whether suspension of deportation should be granted was entirely discretionary with the Attorney General and his decision was not reviewable by a court unless clearly arbitrary.

Upon our further review of the cases of the two respondents, we adhere to our previous decision that suspension of deportation should be denied as a matter of administrative discretion and counsel's motion will, therefore, be denied.

ORDER: It is ordered that counsel's motion be and the same is hereby denied.